ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended	)	WT Docket No. 99-87
	)	
Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies	)	RM-9332
	)	
Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz	)	

To: The Commission

COMMENTS OF KENWOOD COMMUNICATIONS CORPORATION

Kenwood Communications Corporation (Kenwood), a major manufacturer of Commercial and Private Mobile communications equipment, by counsel and pursuant to Section 1.415 of the Commission's Rules, hereby respectfully submits its comments in response to the *Notice of Proposed Rule Making* ("the Notice"), FCC 99-52, released March 25, 1999. Kenwood's interest is in assuring open and competitive markets for modern mobile wireless equipment, and in the continued availability of simple CMRS and PMRS licensing in the land mobile services. For its comments, Kenwood states as follows:

1. The Notice in this proceeding is extremely broad in scope, and extremely general in its proposals. The Commission might more appropriately have proceeded by a Notice of Inquiry, but Kenwood acknowledges the obligation of the Commission under the Balanced Budget Act of 1997[1] to rapidly determine how best to implement the Commission's somewhat conflicting instructions from Congress. Kenwood manufactures a wide variety of high-quality

[1] P.L. 105-33, 111 Stat. 251 (1997).

communications products for the land mobile industry, and seeks to promote open and fair competition in the telecommunications marketplace. Since the Commission has subjected most commercial mobile wireless services (CMRS) to competitive bidding for new licenses for some time, this proceeding, due to the revised competitive bidding authority from Congress relates principally to private mobile wireless services (PMRS). Kenwood suggests that few changes to present rules governing PMRS licensing are necessary, for two reasons.

1. The Omnibus Budget Reconciliation Act of 1993[2] (OBRA) authorized, but did not require, that the Commission use competitive bidding as a means of awarding licenses where mutually exclusive applications are filed for initial licenses or construction permits. The Commission chose not to utilize that authority for several radio services, including PMRS licenses. The same legislation included what was codified as Section 309(j) of the Communications Act, which included the following exemption:

> nothing in this subsection, or in the use of competitive bidding, shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.
>
> *47 U.S.C. §309(j)(6)(E).*

Therefore, OBRA was clearly intended to authorize competitive bidding only (1) to mutually-exclusive applications, and (2) only where those applications cannot be rendered not mutually exclusive through any of several means.

2. The 1997 Budget Act changed neither of these preconditions to the use of competitive bidding. In fact, Section 3002 of the 1997 Budget Act limited the Commission's mandatory competitive bidding authority to those situations in which competitive bidding is "consistent with

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[2] P.L. 103-66, Title VI, §6002(a), 107 Stat. 387 (1993)

the obligations described in paragraph (6)(E)." Section 309(j)(6)(E) thus was not a definition of when mutual exclusivity occurs, but rather what the Commission must do on a regulatory basis to avoid such exclusivity at the outset or after applications are filed. The Commission determined when mutual exclusivity exists, by means of the following test, which continues to be useful now:

> applications are "mutually-exclusive" if the grant of one application would effectively preclude the grant of one or more of the other applications.
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> *Competitive Bidding Second Report and Order*, 9 FCC 2d 2348, 2350 (1994)

What the Commission must do, under the clear terms of OBRA and the Budget Act, is to avoid mutual exclusivity whenever possible through other means, and use competitive bidding only after other methods of resolution of the exclusivity have been exhausted. Congress made this very clear in the House Conference Report to the 1997 Budget Act:

> notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under Section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.

3. Mutual exclusivity in the shared bands below 800 MHz, for example, already is avoided through the present pre-filing coordination procedures for both CMRS and PMRS licensing. The performance of private sector coordinators, while understandably not perfect, is nonetheless overall quite good as a means of avoiding mutual exclusivity. The use of private sector coordinators assures that "engineering solutions" to licensing issues are avoided, and it is a dynamic spectrum assignment process that works adequately at present to insure spectrum efficiency than would any comprehensive change in the licensing process for those bands. Public

safety licensing in the bands below 800 MHz is conducted in the same manner. The process is "first-come, first-served" application processing, on a coordinated basis, through dynamic database consultation. It has served to maximize the use of shared channels and allows "customized" licensing tailored to the specific needs of PMRS or public safety users. It is a useful system, allowing licensing to the limits of capacity. The combination of the coordination process, which insures compatible sharing, and continuation of the process of permitting dealers to group small users into common systems, maximizes spectrum efficiency.

4. The simple fact is that, with shared channels licensed on a site-specific basis, either for internal uses by eligibles, or licensed to a mixture of PMRS and CMRS licensees, a system of competitive bidding carries no guarantee of efficiency in the use of the spectrum. Neither, given the near-term potential development of equipment with digital, dynamic channel selection capability, should the Commission lock the industry into a particular licensing scheme which offers no present advantage over the current scheme. Such would be antithetical to the development of new, spectrum-efficient land mobile technologies which permit dynamic channel selection. Kenwood acknowledges that competitive bidding works well at the present time with geographic-based licensing arrangements on exclusive channels, but on shared channels, especially those used by public safety and private wireless eligibles, the current coordination procedures represent, to the individual licensee or CMRS subscriber, an efficient, effective and reasonably priced means of initial and major change license administration, all at little cost to the Commission.

5. The most important concern in any changes the Commission might ultimately adopt in this proceeding is that the present licensing and coordination system in existing land mobile bands not be changed significantly. The Commission's Docket 92-235 refarming proceeding,

which stands to trigger profound changes in existing land mobile bands below 800 MHz, has only recently been finalized, and any licensing changes would largely moot plans that licensees may have for improvements in the efficiency of spectrum use and implementation of new technologies.

6. Perhaps the best method of proceeding under the 1997 Budget Act would be for the Commission to do as Congress suggested: stay the course with respect to shared allocations for PMRS and CMRS licensing where exclusivity is already avoided through the licensing procedure in place; and allocate additional spectrum *both* for shared, site-specific licensing, and as well for geographic area licensing on an exclusive basis, and limit competitive bidding to the latter. The budget conferees, in the 1997 Balanced Budget Act offered the same expectation:

> the Commission and the NTIA...consider the need to allocate additional spectrum for shared or exclusive use by private wireless services in a timely manner.
>
> *H.R. Conf. Rep. No 105-217, at 575 (1997)*

It is noted that, notwithstanding this admonition from Congress, the Commission has proposed no additional spectrum for PMRS or CMRS use in this proceeding, or otherwise. Additional spectrum, if allocated on a "dual ladder" licensing basis, with segments for shared, coordinated site-specific use, and segments for geographic area, exclusive use, would provide maximum flexibility for licensees and for the public, without the need to consider definitional issues, such as which services to include in those used "to protect the safety of life, health or property", which Congress did not further define.

7. Kenwood believes that there need be little concern expended on that definition, since it is not necessary to utilize competitive bidding where there is no mutual exclusivity. However, since Congress chose not to define such a broad term, in instances where the definition must

apply, it is incumbent on the Commission to use a broad, flexible interpretation, to include utilities and other industrial telecommunications, including public and private transportation, schools, and other services which incorporate communications related to the safety of citizens. A large number of PMRS eligibles' communications relate to the safety of the general public, and there is little logic in attempting to distinguish between those which meet the classic definition of "public safety entities" and those which are merely capable of communications which protect the safety of life, health or property.

8. In the Notice, the Commission entertains the idea of a "band manager license". The band manager would be a Commission licensee, and would be the successful bidder at an auction for a segment of spectrum in a geographic area, and who would provide to sub-licensees PMRS service as a reseller. This is, in one configuration, merely a variety of frequency coordinator, and in another, a type of CMRS service provider. The former is unnecessary, since the frequency coordinator system is already in place. The second is an arrangement that would provide a non-level degree of competition for current SMR and other CMRS providers. Candidly, Kenwood views the band manager concept as a thinly-veiled means of (1) creating situations where competitive bidding for spectrum may be used where competitive bidding otherwise has no place, and (2) delegating licensing functions, now largely a ministerial task in any case. Kenwood recommends that the band manager concept be abandoned and not implemented by the Commission in any format.

9. Finally, Kenwood does not endorse the concept of mandatory migration to narrowband technologies at this time, or the adoption of minimum efficiency standards beyond those already imposed by the refarming proceeding. In the refarming proceeding, the Commission imposed on Kenwood and other manufacturers of land mobile equipment the obligation to provide

narrowband equipment according to a specific timetable, using the equipment authorization process as a timekeeper. Kenwood was dissatisfied with certain portions of that timetable, but has adjusted to the final version thereof adopted by the Commission. Kenwood believes that the combination of the equipment authorization regulations already adopted in the refarming proceeding, coupled with the new channelization plan for the bands below 800 MHz, coupled with the critical spectrum shortages above and below 800 MHz in many markets throughout the United States, are ample market incentives to convert to narrowband, efficient technologies.

10. While Kenwood would be pleased to commence a dialog with the Commission on the subject of migration to spectrum-efficient technologies, the time has not yet arrived for imposition of either efficiency standards beyond those already imposed on manufacturers.

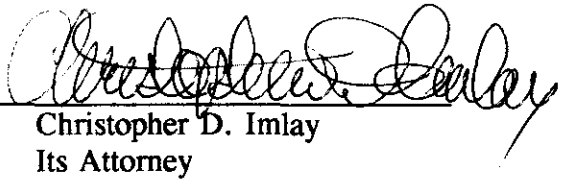
11. In conclusion, there cannot be any overlay of competitive bidding in the existing land mobile allocations below 800 MHz, nor does the 1997 Balanced Budget Act require such. Instead, the Commission should reaffirm its obligation to avoid mutual exclusivity in the licensing process, and the utility of the existing coordination process as a valid means of licensing and achieving spectrum efficiency in shared allocations for site-specific users. This proceeding in this respect is a solution in search of a problem. The coordination process, while not perfect, offers a better alternative to PMRS licensing generally; to PMRS and CMRS licensing in shared bands; and a means of maximizing channel utilization in overcrowded allocations. It is urgent that the present licensing scheme in mature allocations not be disrupted, and that, in accordance with the Balanced Budget Act, the Commission commence a proceeding to allocate additional spectrum for shared and exclusive PMRS spectrum below 2 GHz. Finally, the Commission should not impose mandatory efficiency standards or a mandatory migration schedule for licensees beyond the provisions for such already enacted in the refarming

proceeding.

Therefore, the foregoing considered, Kenwood Communications Corporation respectfully requests that the Commission proceed with the Notice proposal as stated, subject to the clarifications suggested herein.

Respectfully submitted,

KENWOOD COMMUNICATIONS, INC.

By: 
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